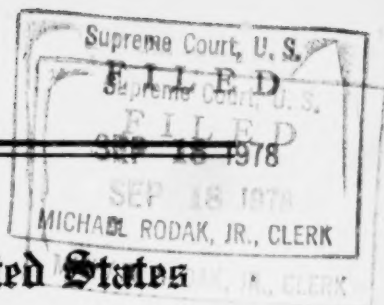


In The
Supreme Court of the United States



No. ... -455

JAMES P. MITCHELL, Superintendent of the
Virginia State Penitentiary
(Formerly Robert F. Zahradnick, Superintendent),
Petitioner,

v.

THEODORE ROOSEVELT GIBSON, JR.,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
JUDGMENT OF THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

J. MARSHALL COLEMAN
Attorney General

JERRY P. SLONAKER
Assistant Attorney General

**Supreme Court—State Library Building
Richmond, Virginia 23219**

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PRELIMINARY STATEMENT

James P. Mitchell, Superintendent of the Virginia State Penitentiary, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on July 19, 1978, in the case of *Theodore Roosevelt Gibson, Jr. v. Robert F. Zahradnick, Superintendent, Virginia State Penitentiary.*

For purposes of uniformity, the respondent here, Theodore Roosevelt Gibson, Jr., shall hereinafter be referred to as petitioner, and the petitioner here, James P. Mitchell, Superintendent, shall hereinafter be referred to as the Commonwealth.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia affirming the judgments of the Circuit Court of the City of Richmond, Division II, is reported as *Gibson v. Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975), *cert. denied*, 425 U.S. 994 (1976). The Memorandum Order of the United States District Court for the Eastern District of Virginia, Norfolk Division, of August 23, 1976 is unreported but is included herein as Appendix A (App. 1). The opinion of the United States Court of Appeals for the Fourth Circuit dated July 19, 1978 is to be published but is not yet reported. The opinion is included herein as Appendix B (App. 10).

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does Admission Into Evidence Of An Inculpatory Statement Made By A Defendant To A State Psychiatrist During A Court-Ordered Psychiatric Examination, Especially When A Court-Ordered Psychiatric Examination Was Sought By Defense Counsel And Counsel Was Aware Of The Particular Arrangements Made By The Court For Such Examination, Violate That Defendant's Right Against Self-Incrimination?

CONSTITUTION AND STATUTE INVOLVED

United States Constitution, Amendment V:

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Code of Virginia (1950), as amended.

§ 19.1-228 (now 19.2-169) *Raising question of sanity; commitment before arraignment.*—If, prior to arraignment of any person charged with crime, either the court or attorney for the Commonwealth or counsel for the accused has reason to believe that such person, because of mental disease or defect, is in such mental condition that he lacks substantial capacity to understand the proceedings against him or to assist in his own defense, and it is necessary for evaluation and observation in order for the court to determine whether such person is mentally competent to plead and stand trial or understand the proceedings against and assist in his own defense, the court or the judge thereof may, after hearing evidence or the representations of counsel on the subject, commit the accused to Southwestern State Hospital, Central State Hospital, or other State facility designated by the Commissioner of Mental Hygiene and Hospitals for examination, evaluation, observation and report if it is felt by the court that temporary hospitalization, not to exceed forty-five days, is required for such determination and such commitment shall be under such limitations as the court may order, pending the determination of his mental condition. However, if in the opinion of the court such examination, evaluation and observation can be satisfactorily performed at some other appropriate facility, the court, in its discretion, may order such examination, evaluation, and observation to be performed at such facility other than the hospitals referred to herein and which facility is designated by the Commissioner of Mental Hygiene and Hospitals as being appropriate.

In any case where the court believes that temporary hospitalization of the accused at Southwestern State Hospital, Central State Hospital, or other State facility designated by the Commissioner is necessary for detailed evaluation, examination, and observation, in order for the court to determine whether such person, because of mental disease or defect, is mentally competent to plead and stand trial or assist in his own defense, the court shall appoint a psychiatric committee of one or more physicians skilled in the diagnosis of insanity, and when any person is alleged to be feeble-minded, the court may likewise appoint persons skilled in the diagnosis of feeble-mindedness, not to exceed three, to examine, evaluate and observe the accused prior to any order of temporary hospitalization as provided herein. The psychiatric committee shall make such investigation of the case as it may deem necessary and shall reduce its finding or findings to writing and report to the court, the attorney for the Commonwealth, and counsel for the accused the mental condition of the defendant at the time of their examination and their medical opinion as to whether more extensive examination, evaluation, and observation is required. Thereafter, if the court, in its discretion, determines that more thorough examination, evaluation, and observation is desirable, the court may commit the accused to Southwestern State Hospital, Central State Hospital, or other designated facility for additional examination, evaluation, and observation as provided for herein.

Upon committing the accused to Southwestern State Hospital, Central State Hospital, or other designated facility, for more extensive examination, evaluation, and observation, the court shall order that a copy of the complaint or indictment, attested by the clerk, together with the name and address of the attorney for the Commonwealth and the attorney for the accused, the nature of the charge and whether it is a felony or misdemeanor, the name and address of the committing court and judge thereof, a summary of the facts surrounding the

alleged crime, the prior criminal record of the accused, if known, the report of the examining psychiatric committee, including a personal history, completed and signed by all members of the examining psychiatric committee, according to the form prescribed by the State Hospital Board, and such other necessary information as may be required by such Board, be forwarded to the receiving hospital. Such information shall be delivered with the accused to the director of the hospital to which the defendant is committed pursuant to the provisions of this section.

Whenever a temporary commitment for a determination of mental condition that requires hospitalization at Southwestern State Hospital, Central State Hospital, or other designated facility is made as provided for in this section, such determination shall be made within forty-five days of the date the hospital received the accused for such determination or within such additional time, not to exceed thirty days, which may be authorized by the court at the request of the hospital director. Within such time, the appropriate hospital director or his duly designated representative shall report his findings to the court or judge which ordered the commitment, the attorney for the Commonwealth, and the attorney for the accused and such court or judge shall forthwith send for the accused and receive him for trial if the defendant is capable of understanding the proceedings against him and capable of assisting in his own defense, but if the for the treatment of his mental disease or defect, an appropriate court shall commit the accused pursuant to the provisions of § 37.1-67 of the Code of Virginia and, thereafter, the accused shall be subject to the provisions of Title 37.1 with respect to treatment, care, transfer, discharge, and all other applicable sections. However, at least ten days prior to the unconditional release or discharge of such individual charged with a crime, the hospital director shall notify the appropriate court or judge thereof, the appropriate attorney for the Commonwealth and the attorney for the accused of such intended release or discharge.

The fact that the defendant lacks capacity to understand the proceedings against him or lacks capacity to assist in his own defense does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and which may be undertaken without the personal participation of the defendant. However, such proceedings or pretrial hearing shall be granted only if counsel for the defendant satisfies the court by affidavit or otherwise that as an attorney he has reasonable grounds for a good-faith belief that his client has, on the facts and the law, a defense to the charge other than mental disease or defect excluding responsibility.

As used in this section the term "court" shall be construed to include courts not of record and courts of record.

STATEMENT OF THE CASE

On the night of April 10, 1974, petitioner shot and killed his wife and father-in-law. Warrants were issued and petitioner was arrested on April 14, 1974. The following day, counsel was appointed to represent him. On April 17, upon the motion of his appointed defense counsel, petitioner was ordered examined by two Richmond psychiatrists. Two days later, that order was voided, and on April 22, the petitioner was ordered committed to Central State Hospital to determine his mental competence to plead and stand trial. Copies of all such orders were served on defense counsel. On July 11, the hospital reported to the Court that the petitioner was mentally competent and capable of standing trial.

On September 25 and 26, petitioner was tried on indictments for the murder of his wife and father-in-law. During trial the prosecution called the psychiatrist who had examined the petitioner at Central State Hospital, and this

witness was permitted to testify, over defense objection, that the petitioner had admitted killing his wife and father-in-law. (Tr. 57-61).

On appeal to the Supreme Court of Virginia on convictions of first degree murder of his estranged wife and second degree murder of his father-in-law, petitioner contended, among other assignments of error, that the testimony of the psychiatrist should have been excluded on the grounds of doctor-patient privilege and the right against self-incrimination. In the trial court petitioner's defense counsel had complained that there was no showing that the psychiatrist who interviewed petitioner had advised him of his Constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and defense counsel asserted that he should be given the opportunity to determine whether such warnings had been given by the psychiatrist. (Tr. 77-78, 81). In his Assignments of Error for appeal he maintained that the "(s)tatements were inadmissible because of the doctor-patient privilege and for further reasons that the defendant was not allowed to determine whether he was properly advised of his constitutional rights prior to making said statements. . . ."

The Virginia Supreme Court unanimously affirmed the judgments below, and petitioner sought certiorari from the United States Supreme Court. Certiorari was denied on May 24, 1976. (*Gibson v. Commonwealth*, 425 U.S. 994 (Mem. Order) (1976)).

Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division, and by Memorandum Order dated August 23, 1976, the petition was dismissed. (App. A). However, on July 19, 1978, that judgment was reversed by the United States Court of Appeals for the Fourth Circuit and remanded to the District Court with instructions to

issue a writ of habeas corpus, if the Commonwealth did not elect to retry petitioner within a reasonable time. (App. B).

On August 16, 1978, the Court of Appeals granted the Commonwealth a stay of its mandate for thirty days pending application to this Court for certiorari.

STATEMENT OF FACTS

Petitioner and his wife, Marian J. Gibson (one of the victims), had two children. There were marital difficulties and she left with the children to live elsewhere. On February 22, 1974 she had two warrants issued against petitioner for felonious assault, and at the time of the two killings on April 10, 1974, petitioner was free on a \$2,500.00 bond. Over a month before the killings, petitioner was upset and disturbed due to the above warrants and business reverses, and his love for and separation from his children, and he dictated a tape on his son James' tape recorder stating that he was no good to anyone, that he had changed beneficiaries on insurance policies and other things, and that he was going to be dead when the tape was heard. He gave the tape to his mother, not revealing its contents, and admonished her not to use it until after his death. On April 10, 1974, after receiving a phone call at his business from his 10-year old daughter, he left work and proceeded to the home of his wife and was there hiding behind bushes about five minutes before his estranged wife, Marian, and her father, Maryland Coley, drove up and entered the yard to go into the house. With a shotgun loaded with buckshot, petitioner shot Coley in the chest, killing him. Marian ran onto the front porch of her sister, next door, but before gaining entrance, petitioner fired again, killing her. The sister, Ann, heard the first shot and was on her way to her front door when she heard Marian calling to "let her in." As she got to the door she

heard Marian say, "Teddy, don't shoot me. For God's sake, don't kill me, Teddy." As she "turned the (door) lock" she heard shots and the glass in the door shattered. As she opened the door, Marian "fell in on my living room floor." She did not see who fired the shots, but petitioner's first name is Theodore and his nickname was "Teddy". (Tr. 34-35). A "wooden plug" for an automatic shotgun was found by a policeman in the back seat of a Pinto car belonging to petitioner's sister, who testified that she had let "her baby brother use," on April 10. (Tr. 43-47). The killings took place about 11:45 p.m., April 10, 1974. (Tr. 35). No one could testify as to having seen the petitioner fire the fatal shots, but a neighbor across the street did see an individual resembling his build there just prior to the shootings.

Also, as indicated previously, during petitioner's trial in the state court, the Commonwealth called as a witness Dr. James C. Dimitris, who had examined the petitioner at Central State Hospital. Over defense objection, Dr. Dimitris was permitted to testify that the petitioner, in the course of interviews conducted to determine his mental condition, had admitted killing his wife and father-in-law. (Tr. 57-61).

ARGUMENT

I.

Admission Into Evidence Of An Inculpatory Statement Made By Petitioner To A State Psychiatrist During A Court-Ordered Psychiatric Examination, Especially When A Court-Ordered Psychiatric Examination Was Sought By Defense Counsel And Counsel Was Aware Of The Particular Arrangements Made By The Court For Such Examination, Did Not Violate The Petitioner's Right Against Self-Incrimination.

It should be recognized at the outset that petitioner's defense counsel desired and filed a motion for a court-

ordered psychiatric examination of his client. Although the court voided the particular order which had been entered pursuant to defense motion, the defense attorney was informed that the court had elected to send the petitioner to Central State Hospital for the examination rather than having the function performed by psychiatrists in Richmond as originally provided. There was no objection whatsoever to this change.

The Commonwealth submits that a psychiatric examination does not give rise to a violation of the Fifth Amendment privilege if the petitioner was not *compelled* to answer the questions propounded by the psychiatrist. *People v. Ditson*, 57 Cal.2d 415, 20 Cal.Rptr. 165, 369 P.2d 714 (1962); *State v. Olson*, 274 Minn. 225, 143 N.W.2d 69 (1966). See generally *Green v. State*, 222 Ark. 308, 259 S.W.2d 142 (1953).

In accord with this view, the Supreme Court of Pennsylvania, in *Commonwealth v. Byrd*, 219 A.2d 293 (1966), held that a psychiatric examination does not violate a defendant's right against self-incrimination, even in cases of compulsory examination, provided that the defendant is not compelled to answer any questions asked of him by the psychiatrist, because the privilege does not prohibit the introduction of evidence given by a defendant voluntarily. Subsequently, the Pennsylvania Supreme Court reaffirmed this analysis in the case of *Commonwealth v. Brown*, 265 A.2d 101 (1970). The following language from the opinion is significant:

The defendant next urges that the order of the court below appointing, at the Commonwealth's behest, a psychiatrist to examine the defendant was erroneous in that it did not specifically provide that the defendant was not to be compelled to answer any questions posed to her by the Commonwealth's examining psychiatrist

and, thus, her constitutional rights were violated.

In *Commonwealth v. Byrd*, 421 Pa. 513, 219 A.2d 293, cert. denied, 385 U.S. 886, 87 S.Ct. 181, 17 L.Ed.2d 114 (1966), we held that a court order requiring a person accused of and indicted for murder to submit to a neuro-psychiatric examination by a psychiatrist selected by the Commonwealth was not violative of the constitutional provision against self-incrimination, provided that the accused be not compelled to answer any questions propounded to the accused by the psychiatrist making the examination. See also: *Commonwealth v. Musto*, 348 Pa. 300, 35 A.3d 307 (1944).

To determine this issue we must look to the factual posture presented of record. The defendant petitioned the court for the appointment of a psychiatrist to aid in the preparation of her defense. The court allowed the defendant the services of a psychiatrist. The Commonwealth then, in the protection of its interests and in the preparation of its case to meet a possible defense of insanity, sought and obtained an order directing the defendant to submit to an examination by a psychiatrist selected by the Commonwealth.

While the order of court requiring the defendant to submit to an examination by a Commonwealth-selected psychiatrist did not specifically state that the defendant was not required to answer questions which might incriminate her, the fact is that defendant was at all times, and particularly during the examination of defendant by the Commonwealth-appointed psychiatrist, represented by counsel to protect her interest and to preserve her right not to be subjected to self-incrimination. (265 A.2d at 106).

In the case at bar, petitioner's own attorney, not the Commonwealth's, requested the psychiatric examination. Although questions asked by the psychiatrist during the mental examination were not asked for the purpose of eliciting admissions of guilt but rather for the purpose of determining defendant's sanity, certainly counsel was aware that admis-

sions would likely be made during the course of such examination. (Petitioner has never alleged that he was denied effective assistance of counsel). Furthermore, it is essential to note that nothing in the order of court or the provisions of §19.1-228 of the Code of Virginia (1950), as amended, (now § 19.2-169) compelled petitioner to answer any questions of the psychiatrist conducting the evaluation, and no penalty is prescribed even for failing to cooperate at all in the examination. Although the record does not reveal what efforts defense counsel may have exerted to protect his client's interests during the psychiatric interviews, certainly no action by the Commonwealth prohibited counsel from advising his client or taking such measures as he deemed appropriate or necessary in regard to potential admissions of guilt. There is no indication in the record whatsoever of unreliability or untrustworthiness of the statements made to the psychiatrist, and there was no evidence of compulsion. Also, at trial the defense counsel did not object to admission of the statement on traditional voluntariness grounds but objected to not being permitted to elicit whether formal *Miranda* warnings had been given by the psychiatrist. (Tr. 81). The record reveals from the testimony of Dr. Dimitris that at the time of the psychiatric interview the petitioner was "oriented" and "knew where he was, who was talking to him, what was questioned of him, and he was able to give events, related to the subject coherent and meaningful answers." (Tr. 119). Dr. Dimitris testified further that petitioner "knew that he was at Central State; that he had charges of murder on two counts against him, and that he was undergoing psychiatric evaluation." (Tr. 119). Petitioner also knew how long he had been at the Medical College of Virginia before being transferred to Central State Hospital. (Tr. 119). Dr. Dimitris saw petitioner a minimum of three times a week and found him to be "competent" and

"eager to go back and face the charges." (Tr. 112-123). Dr. Dimitris warned petitioner prior to the interview that he had "the absolute right to tell us or not to tell us about the offense." (Tr. 125). As indicated previously, at no time did defense counsel object at trial on the ground that the statement made to Dr. Dimitris was "involuntary."

The Supreme Court of Virginia in its unanimous opinion in *Gibson v. Commonwealth, supra*, stated that:

[N]othing in the order of commitment or in the statute authorizing the commitment (Code § 19.1-228, now § 19.2-169) compelled the defendant to answer questions propounded by his examining psychiatrist concerning the crimes with which he was charged. Neither does the record disclose that during the psychiatric examination any compulsion was employed to elicit the statements which were later used against the defendant at trial. Indeed, the examining psychiatrist testified that although the defendant was told it "would be helpful" if he related the circumstances of the crimes, he was also informed he had "the absolute right to tell . . . or not to tell" his examiners about the offense. Notwithstanding this clear warning and despite the fact that he was represented by competent counsel throughout the commitment and examination period, the defendant freely recited the details of the offenses with which he was charged. His incriminating statements, therefore, were voluntary, and hence admissible. (*Gibson v. Commonwealth, supra*, at 414-415).

The United States District Court below agreed with the unanimous decision of the Virginia Supreme Court and held that "[r]elative to the admission of the testimony of Dr. Dimitris, it did not violate petitioner's Fifth Amendment rights for the reasons as so stated by the Supreme Court of Virginia in its opinion on petitioner's appeal [in] *Gibson v. Commonwealth, supra*. There was no violation of petitioner

not being advised of his rights relative to his conversation with the doctor." (App. 5).

The Commonwealth recognizes, as did the Supreme Court of Virginia in its opinion in *Gibson v. Commonwealth, supra*, that there is a split of authority on the general question of whether admission of inculpatory statements made to a psychiatrist at a court-ordered psychiatric examination violates the right against self-incrimination. The United States Court of Appeals for the Fourth Circuit pointed out in its opinion in the instant case that seven other United States Circuit Courts of Appeals have indicated that such statements cannot be admitted on the issue of guilt. (App. 16). However, the split of authority and resulting need for uniform and final resolution of the question by this Court form a primary consideration for granting certiorari in this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the judgment in this case reversed.

Respectfully submitted,

J. MARSHALL COLEMAN
Attorney General of Virginia

JERRY P. SLONAKER
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel for the petitioner in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before September 15, 1978, I mailed copies of the foregoing Petition for a Writ of Certiorari to Theodore Roosevelt Gibson, Jr., No. 104285, Virginia State Penitentiary, 500 Spring Street, Richmond, Virginia 23219, and Stephen W. Bricker, Esquire, 1001 East Main Street, Suite 515, Richmond, Virginia 23219, counsel for respondent.

JERRY P. SLONAKER
Assistant Attorney General

APPENDIX

APPENDIX A

In The
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Theodore Gibson, #104258)	
	Petitioner)	
)	
v.)	Misc. No.
)	76-383-N
Robert F. Zahradnick, Superintendent)	
of the Virginia State Penitentiary)	
	Respondent)	

MEMORANDUM ORDER

Petitioner, a state court prisoner, signed a petition for a writ of habeas corpus, received by the Clerk of this Court, Norfolk, Virginia, June 24, 1976. Order of this Court of July 7, 1976 called upon respondent to answer, and answer was filed July 29, 1976.

Petitioner was convicted, after his pleas of not guilty and a joint 2-day jury trial, September 25 and September 26, 1974, in the Circuit Court of the City of Richmond, on 2 murder indictments. He was sentenced to terms of life on the first degree murder conviction and 20 years on the second degree murder conviction, September 26, 1974.

Upon writ of error the trial court was affirmed December 1, 1975.

The Supreme Court of the United States denied certiorari on a writ May 24, 1976.

The numerous allegations of the instant petition refer to:

App. 2

(1) Error of the trial court in refusing to quash the indictments on the grounds that petitioner was legally insane during all proceedings prior to trial;

(2) (a) Error of the trial court after objection relative to the testimony of Dr. James C. Dimitris as to statements made by petitioner to the Doctor on the grounds of inadmissibility because of the doctor/patient privilege; (b) also as defense counsel was not allowed to inquire as to whether petitioner was previously properly advised of his rights before making the statements, and (c) whether petitioner was afforded a timely psychiatric examination;

(3) Error of trial court in allowing aforesaid statements to be introduced by the Commonwealth pursuant to Order of the trial court prior to trial;

(4) Error of trial court in allowing introduction of certain physical evidence such as shotgun shells and a shotgun plug without connecting them to other evidence in the case;

(5) Error of trial court in allowing evidence of crimes committed by defendant one and one-half months prior to, and unrelated to this offense;

(6) Error of the trial court in not granting a mistrial as the court commented on the credibility of Dr. Dimitris;

(7) Error of the trial court in refusing to instruct the jury on the question of defendant's sanity;

(8) Error of trial court in adversely ruling against defense counsel on numerous objections made during the trial, thus preventing the defendant from obtaining a fair and impartial trial;

(9) Error of trial court in refusing defendant's request that the jurors be questioned as to whether they had seen an article in the morning newspaper, the morning following the first day of the trial;

(10) Refusal to strike the evidence as same being contrary to the law and the evidence, and

App. 3

(11) Error not to grant a mistrial alleging confusion by the jury in returning one first degree murder, and a second, second degree murder verdict upon the same basic facts.

This Court will first rule upon allegation (10) to give clarity in discussing the other allegations.

Petitioner and his wife, Marian J. Gibson (one of the victims), had 2 children. There were marital difficulties and she left with the children to live elsewhere. On February 22, 1974 she had 2 warrants issued against petitioner for felonious assault, and at the time of the instant involved 2 killings of April 10, 1974, petitioner was free on a \$2,500.00 bond. Over a month before the killings, petitioner was upset and disturbed due to the above warrants, business reverses, and his love for and separation from his children, and dictated a tape on his son James' tape recorder setting forth that, he was no good to anyone; he had changed beneficiaries on insurance policies and other things; he was going to be dead when the tape was heard, and gave the tape to his mother, not revealing its contents, and admonishing her not to use it until after his death. On April 10, 1974, after receiving a phone call at his business from his 10-year old daughter, he left work and proceeded to the home of his wife, and was there hiding behind bushes about 5 minutes before his estranged wife, Marian, and her father, Maryland Coley, drove up and entered the yard to go into the house. With a shotgun loaded with buckshot, petitioner shot Coley in the chest, killing him. Marian ran onto the front porch of her sister, next door, but before gaining entrance, petitioner again shot, killing her. The sister, Ann, heard the first shot and was on her way to her front door when she heard Marian calling to "let her in." As she got to the door she heard Marian say, "Teddy, don't shoot me. For God's sake, don't kill me, Teddy." As she "turned the [door] lock" she heard shots and the glass in the door shattered. As she opened the

door, Marian "fell in on my living room floor." She did not see who fired the shots. Petitioner's first name is Theodore and his nickname was "Teddy". (T. 34-35). It is assumed by this Court that the "shotgun" was an automatic shotgun as a police officer found a "wooden plug" in the back seat of a Pinto car belonging to petitioner's sister, who testified that she had let "her baby brother use," on April 10. (T. 43-47). The killings took place about 11:45 p.m. April 10, 1974. (T. 35). No one could testify as to having seen the petitioner fire the fatal shots, but a neighbor across the street did see an individual resembling his build there just prior to the shootings. The above are only a few of the facts of the 193-page transcript. The sufficiency of the evidence cannot be considered on federal habeas corpus absent a showing that the judgment is totally devoid of evidentiary support. *Williams v. Peyton*, 414 F.2d 776 (4th Cir. 1969). The evidence here is overwhelming and there is no merit in this allegation.

Relative to allegation (1), petitioner was permitted to introduce the medical records from the Medical College of Virginia and those from Central State Hospital to support his motion. A previous motion had been filed with the Court. Defense counsel wanted said records to be given to the jury at that point and stated that, "I understand you would probably overrule [the motion], but I would like to just put in the record what I hoped to show." (T. 19). The court introduced them in support of the motion only, stating the doctors were present and could testify, and any of the records properly authenticated could at the proper time be introduced into evidence, but further stated relative to the motion that, "I am not going to admit records just for laymen to take out and read." (T. 20). The court ruling was correct, and there is no merit in this allegation.

As to allegation (2), the Supreme Court of Virginia is

determinative of state law on the scope of the statutory doctor/patient privilege. *Gibson v. Commonwealth*, 216 Va. 412, 219 S.E. 2d 845 (1975). The Virginia Legislature has created such a privilege in civil cases only. Relative to the admission of the testimony of Dr. Dimitris, it did not violate petitioner's Fifth Amendment rights for the reasons as so stated by the Supreme Court of Virginia in its cited opinion on petitioner's appeal *Gibson v. Commonwealth*, *supra*. There was no violation of petitioner not being advised of his rights relative to his conversation with the doctor. Petitioner was afforded a timely psychiatric examination as shown by the transcript records. There is no merit in this allegation.

Allegation (3) is closely related to allegation (2). Defense counsel asked that the records be made a part of trial record on his motion before trial referred to under allegation (1) above. The doctors' report was in these records. There is no merit in this allegation.

Allegation (4) refers to the introduction of the shotgun shells and the "wooden plug" into evidence without connecting them to other evidence in the case. Initially, it is noted that the shotgun was not found and was thus not introduced into evidence. The pellets in the 2 bodies were referred to as shotgun pellets, #2 buckshot and #7½, as was testimony of the splintering of the door and door frame where Marian was shot. The shells were found in the yard where Coley was shot. Clearly, they were sufficiently connected up to the killings. There is no merit in this allegation.

In regard to allegation (5), this was opened up by the defense but when the Commonwealth then attempted to go into same, defense objected. In the final analysis the trial court correctly ruled that same was proper evidence by the Commonwealth to show scheme, plan, motive, all leading up to the 2 murders. Same was opened up by the defense in putting the tape recorder tape contents into the record, same

App. 6

being replayed for the jury, the defense then arguing that parts of it were beneficial to the defense relative to the insanity question. The Supreme Court of Virginia in *Gibson*, supra, ruled this evidence was properly admitted into evidence. See *Grundler v. North Carolina*, 283 F.2d 798 (4th Cir. 1960). There is no merit in this allegation.

Relative to allegation (6), the challenged comments by the trial judge were merely an explanation by the judge of his ruling that the defense at that point could not treat a psychiatrist, the doctor, as an adverse witness as defense wished to do when defense called the doctor as a witness. The doctor had testified for the Commonwealth and had been cross-examined by defense counsel in the prosecution's case. The judge merely said if the defense wished to call the doctor, he would be the defense's witness, and that in the doctor's prior testimony the court had noted no hostility or preconceived notions. (T. 116-117). There is no merit in this allegation.

Allegation (7) as to the court refusing to grant defendant's proffered instruction on insanity, the defense offered no evidence that petitioner was insane. In cross-examination of 2 Commonwealth witnesses who were psychiatrists and had examined petitioner, there was no evidence of insanity. Petitioner's actions in the jail 4 days after the offenses, were explained by witnesses. Dr. Dimitris did testify that an experience at the jail the night petitioner was arrested, which was 4 days after the shootings, showed that the petitioner did experience an acute mental breakdown at the jail. (T. 121). Dr. Mullaney, a psychiatrist, saw petitioner after surgery at the Medical College of Virginia on April 16, the day after petitioner's problems in the jail, April 15, and also saw him again on April 19, at which time petitioner was very paranoid. His conclusion at that time was that petitioner had a schizophrenic type of mental disorder of a

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paranoid type. "*At that time*" (emphasis added) petitioner could not relate to reality. This doctor could not tell anything of petitioner's behavior prior to "this time" as he had no information except the jail episode. He did not talk to petitioner about the events of April 10 or petitioner's condition at that time. On May 20 petitioner's "surgical care" was all right and there was no change in the doctor's original diagnosis. This doctor testified, when asked a hypothetical question that if one had shot and killed one's wife and father-in-law with a shotgun whether same would have a tremendous impact on one's mental status. Dr. Mullaney responded, "Yes, sir, this could have a very definite impact on one." (T. 109).

Dr. Dimitris, a psychiatrist at Central State Hospital, saw petitioner in July. He testified that petitioner told him of the events leading up to the shootings, and the doctor testified that his opinion was that petitioner was competent in April at the time of the shootings. In July petitioner "was aware of his natural quality and the consequences of his acts." (T. 61). There is no merit in this allegation.

Allegation (8) sets forth that petitioner was not afforded a fair and impartial trial. This Court has closely noted the objections by defense throughout the trial and the court's ruling on same. The court's rulings were correct, and on several occasions overly fair to petitioner. Chief Justice Burger of the Supreme Court of the United States pointed out in *Brown v. United States*, 411 U.S. 230 (1973), "A defendant is entitled to a fair trial, but not a perfect one, for there are no perfect trials." The test was more than met in this well defended case. There is no merit in this allegation.

Relative to allegation, (9), after the first day of trial before adjournment, both the Commonwealth Attorney and defense counsel advised the court that they did not wish the

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jury sequestered. They were fully advised and admonished relative to radio broadcasts, TV's, newspapers, and further not to discuss the case with anyone, including their respective husbands or wives. They were to return at 10:30 a.m. Before the court gave the jury instructions or before argument by respective counsel, defense counsel brought up the article in the morning paper and asked that the jurors be questioned relative to same. Upon inquiry by the court, counsel had no information that any juror had any knowledge of the article, and the court, having fully admonished the jury the evening before of its duties and responsibilities, and the defense counsel affirmatively suggesting that the jury not be sequestered, properly overruled the motion. There is no merit in this allegation.

Allegation (11) alleges apparent confusion by the jury in its finding of first degree murder on the one indictment and second degree on the other indictment, "upon the same basic facts." First, it is noted the verdicts were not "upon the same basic facts." The jury could very well on the facts see "wilful, deliberate, and premeditated killing," relative to the killing of the wife, and the absence of same in the killing of Coley. There are other elements also and this Court feels it is unnecessary to even discuss them. The jury heard the evidence and applied the law to these facts. There is no merit in this allegation.

It is ORDERED that the petition be, and it hereby is, DENIED and DISMISSED.

The petitioner may appeal in forma pauperis from this *final order* by filing a *written* notice of appeal with the Clerk of this Court, Post Office Box 1318, Norfolk, Virginia 23501, within thirty (30) days from this date. For the reasons above stated, the Court declines to issue a certificate of probable cause.

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Let the Clerk send copies of this Order to the Attorney General of Virginia, the Clerk of the Circuit Court of the City of Richmond, and to the petitioner.

RICHARD B. KELLAM
United States District Judge

Norfolk, Virginia
August 23, 1976

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APPENDIX B

In The
UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

No. 77-1415

Theodore Roosevelt Gibson, Jr.,
Appellant,

v.

Robert F. Zahradnick, Superintendent,
Virginia State Penitentiary,
Appellee.

Appeal from the United States District Court for the Eastern
District of Virginia, at Norfolk. Richard B. Kellam, District
Judge.

Argued: October 6, 1977 Decided: July 19, 1978

Before HAYNSWORTH, Chief Judge, FIELD, Senior
Circuit Judge, and THOMSEN*, Senior District Judge

Stephen W. Bricker for Appellant; Jerry P. Slonaker, As-
sistant Attorney General (Anthony F. Troy, Attorney Gen-
eral of Virginia on brief) for Appellee.

* Senior District Judge for the District of Maryland sitting by
designation.

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HAYNSWORTH, Chief Judge:

Gibson was convicted in a Virginia state court for the first degree murder of his estranged wife and for the second degree murder of his father-in-law. The prosecution proved Gibson's identity as the assailant primarily through the testimony of a state-employed psychiatrist, who told the jury that Gibson admitted to him during the examination that Gibson had shot and killed his wife and father-in-law.

Gibson appealed his conviction to the Supreme Court of Virginia, on the ground, among others, that his inculpatory statement to the psychiatrist should not have been admitted in evidence to prove his guilt. That court affirmed the conviction. *Gibson v. Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975), and the United States Supreme Court denied certiorari, 425 U. S. 994 (1976).

The federal district court denied Gibson's petition for a writ of habeas corpus. We reverse and hold that a writ of habeas corpus should be issued on the ground that introduction of the inculpatory statement at trial to prove Gibson's guilt violated Gibson's constitutional privilege against self-incrimination.

I.

Gibson and his wife, Marian, became embroiled in marital difficulties in consequence of which she, with their two children, moved out of the house and into the home of her father, while Gibson went to live with his mother. Bitterness developed between the couple, and in February, 1974, Gibson shot and wounded his estranged wife and their daughter. Gibson was arrested under charges of felonious assault and was placed under bond. There was lay testimony at Gibson's trial that Gibson was extremely upset by his sep-

aration from his wife and his children, by the pendency of the assault charges and by serious business reverses that he encountered. On a tape recorder he dictated a suicide message, in which he stated that life was not worth living without his wife and children and that he intended to terminate his life. He delivered the tape to his mother with instructions that she listen to it after his death.

On April 10, 1974, Gibson's son telephoned him complaining that his mother had denied him food at mealtime. This led to an angry telephonic exchange between Teddy Gibson and Marian. At trial the prosecutor's contention was that Teddy went to the home of his father-in-law later that evening and hid behind some bushes until his father-in-law and Marian arrived. Gibson then stepped from behind the bushes, killing the father-in-law with a blast from a buckshot loaded shotgun. Marian ran next door to the home of her sister. The sister heard Marian's cries for admittance and pleas to "Teddy" not to kill her. Just as the sister was opening the door, however, there was a second blast from the shotgun and Marian fell dead into the entrance way of the sister's house. Since it was dark, the sister did not see the assailant, though earlier another neighbor had seen a man approximating Gibson's size and build in the yard of the father-in-law's house.

Five days later, Teddy Gibson was arrested. In the lock-up room in the courthouse, Gibson removed all of his clothes and persistently talked into a sink, seemingly believing that some one was engaged in an animated conversation with him through the sink. Later that day, after he had been transferred to the jail, Gibson literally tore one of his ears from the side of his head. Gibson and his ear were rushed to the Medical College of Virginia, and the ear was sewn back on to his head, and he was later examined by psychiatrists. According to the psychiatrists, Gibson believed that

a microphone had been implanted in his ear; he tore off his ear in an attempt to get the microphone out, and he believed that the surgery had as its partial purpose the actual extraction of the microphone.

Dr. John Mullaney, one of the psychiatrists at the Medical College of Virginia who examined Gibson, wrote on April 16 and 19 that Gibson was "in a very paranoid state, distrusting medication, being called by someone with a tape recorder who reads his thoughts and sends him replays, et cetera, with other schizophrenic signs about thought disorder, labile and inappropriate effect, to the point of confusion and agitation." (Transcript 102-03.) The jury could have found from Dr. Mullaney's report and his explanatory testimony at trial that a few days after the killings, Gibson was completely out of touch with reality and was legally insane. But Dr. Mullaney was unable to say whether Gibson's condition had existed at the time of the killings, and he acknowledged that the killings *could* have caused the condition.

Meanwhile, a lawyer had been appointed to represent Gibson. He sought and obtained a court order that Gibson be examined by a private psychiatrist in Richmond. Dr. Mullaney concluded, however, that when Gibson's ear was sufficiently healed to permit his discharge from the hospital by the surgeon, Gibson's mental condition was such that he could not be cared for in the city jail. He reported that a transfer of Gibson to the Central State Hospital was requisite. This occasioned the cancellation of the order for private psychiatric evaluation and a new court order transferring Gibson to Virginia Central State Hospital for a determination of his insanity and competence to stand trial.

At the Central State Hospital, with medication and treatment, Gibson's condition began to improve until he was returned to the Richmond jail with a certification that he

was competent to stand trial, though there was a recommendation that medication be continued.

At the subsequent trial, the Commonwealth presented Dr. Dimitris, a psychiatrist at Central State Hospital, for the purpose of proving an incriminating statement made by Gibson. Dr. Dimitris, over objection, testified that Gibson had told him that he remembered going to his father-in-law's house and shooting his father-in-law, but Gibson claimed not to have remembered anything after that. The Commonwealth did not inquire of Dr. Dimitris about Gibson's mental or psychiatric condition while at Central State Hospital or at the time of the slayings. Dr. Dimitris was offered solely for the purpose of proving the incriminating statement.

Later, Dr. Dimitris was called as a witness for the defense. Based upon the reports he had received and his own observations after Gibson's arrival at Central State Hospital, Dr. Dimitris expressed the opinion that Gibson had been completely out of touch with reality and was not responsible for his actions. He thought that Gibson probably was not so mentally impaired at the time of the shootings, though he could not pinpoint the onset of the complete mental breakdown that became evident at the jail. Dr. Dimitris testified that he told Gibson that Gibson had the right to refuse to talk to him about the killings, but he also told Gibson that it "would be helpful" if Gibson told him about the events, and he testified that for Gibson this "was an anxiety-generating process. It was not an easy thing to deal with." The anxiety could have stemmed in part from recollection of the events, but it was substantially based upon the examination process itself and the uncertainty about the future, for Gibson "was realizing that something was pending * * * [and that a] day in court was imminent."

The confession played a substantial part in Gibson's con-

viction. Coupled with the sister's testimony of Marian's protestations to "Teddy," it assured a conviction if the insanity defense did not prevail.

II.

The problem presented here was substantially answered for us in *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968). The immediate problem in *Albright* was whether a defendant in a criminal proceeding had a privilege not to be subjected to examinations by government selected psychiatrists, when the defendant himself proposed to offer some evidence to indicate that he was insane. The conclusion, of course, was that the United States may compel a defendant to submit to such an examination and evaluation, where the purpose of the prosecutor is to obtain expert witness testimony that would be indicative of the defendant's sanity. In the federal system, commitments for psychiatric examinations are specifically authorized by 18 U.S.C.A. § 4244 when the purpose is to determine a defendant's competency to stand trial. That section, however, contains an explicit prohibition against the use of any statement on the issue of guilt. When the question is not one of competency to stand trial, but the sanity of the accused at the time of the act charged in the indictment, we held that a federal court had an inherent power to order a psychiatric examination and evaluation to assist in a determination of the defendant's mental and emotional condition at the time of the commission of the act. In that situation, as in this case, there is no statutory prohibition against use of any statement made by a defendant on the issue of guilt. However, we held in *Albright* that, in that situation, the Fifth Amendment privilege bars the use of an incriminating statement made to a psychiatrist for the purpose of proving a defendant's guilt.

Thus, *Albright* drew a sharp distinction between the use

of the results of compulsory psychiatric examinations on the issue of sanity and the use of an incriminating statement made during a compulsory examination on the issue of guilt. The former is permissible; the latter is constitutionally forbidden. At least seven other United States Courts of Appeals have since indicated agreement with our holding that this kind of statement cannot be used on the issue of guilt. See *United States v. Bennett*, 460 F.2d 872, 878-80 (D.C. Cir. 1972); *Thornton v. Corcoran*, 407 F.2d 695, 699-701 (D.C. Cir. 1969); *United States v. Driscoll*, 399 F.2d 135, 139, 141 (2d Cir. 1968); *United States v. Alvarez*, 519 F.2d 1036, 1042 (3d Cir. 1975); *United States ex rel. Smith v. Yeager*, 451 F.2d 164, 165 (3d Cir.), cert. denied, 404 U.S. 859 (1971); *United States v. Williams*, 456 F.2d 217, 218 (5th Cir. 1972); *United States v. Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971); *United States v. Reifsteck*, 535 F.2d 1030, 1034 n.1 (8th Cir. 1976); *United States v. Julian*, 469 F.2d 371, 375-76 (10th Cir. 1972). The same rule must apply in the state courts by force of the Fourteenth Amendment.

The rule is a sensible one. The Commonwealth and the defendant may both be in substantial need of the assistance of expert testimony on the issue of sanity. The most dependable and reliable testimony by psychiatrists would be unobtainable in many cases unless they were free to inquire into the prior aberrant conduct of the defendant, including his participation in the criminal activity with which he is charged. A person's mental condition, his motivation and his delusions would be undiscoverable in most instances unless the psychiatrist knows what the defendant has done and can engage in a penetrating discussion with the person about it. Thus, as we recognized in *Albright*, it may be necessary in some cases for the psychiatrist, in testifying on the issue of sanity, to disclose the criminal activity related to him

by the defendant, but, in that event, prompt and strong cautionary instructions are required that such testimony must not be considered by the jury on the issue of guilt. Of course, no such limiting instructions was given here, for the Commonwealth presented Dr. Dimitris only on the issue of guilt and not at all on the issue of sanity.

It is contended that Gibson's statement to Dr. Dimitris was "voluntary," so that the Fifth Amendment privilege did not apply. It is true that Dr. Dimitris testified that before Gibson talked to him about the slayings, Dr. Dimitris had told Gibson that he had a right not to do so. But Dr. Dimitris also told Gibson that it "would be helpful if he would" talk about the slayings, and Dr. Dimitris testified that, for Gibson, the examination process was anxiety-generating and that Gibson had come out of his state of complete disorientation to the extent that "he was realizing that something was pending * * * [and that] a day in court was imminent." Dr. Dimitris did not tell Gibson that an admission by him could be used in court to convict him of murder.¹ It was not the grave consequences which might follow an admission that were emphasized; on the contrary, Dr. Dimitris suggested that it would be helpful if he spoke freely, and this at a time of great anxiety when Gibson would be expected to grasp at any straw offering a prospect of help. Dr. Dimitris, of course, was right. If he was to come up with a reliable appraisal of Gibson's mental condition, he needed to know more than he could possibly know if Gibson's lips were sealed about the events of April 10. For that very reason, we held in *Albright* that the defendant was not entitled to the presence of a lawyer during such a psychiatric ex-

1. We do not mean to imply that if a defendant were given a full *Miranda* warning, an incriminating statement made by the defendant during the ensuing psychiatric examination could be used at trial to prove the defendant's guilt.

amination. The lawyer's insistence that his client not talk about the crime could frustrate the very purpose of the examination. Under all of the circumstances, we cannot conclude that the statement by Dr. Dimitris, that he had a right not to answer, made Gibson's subsequent speech voluntary in the sense that it was a free and willing choice with appreciation of the possible adverse consequences.

Alternatively, the Commonwealth contends that Gibson waived his constitutional privilege when his attorney sought and obtained the first order for an examination and evaluation by a private psychiatrist. The causative relation between the lawyer's request and the actual examination is tenuous at best, however. It was Dr. Mullaney who determined that a commitment of Gibson to the Central State Hospital was necessary for Gibson's care and treatment. The court's order that Gibson be examined and evaluated while there may have had some unknown relation to defense counsel's earlier request for private psychiatric examination, but the examination would have been requisite quite without regard to the earlier request. Under the circumstances presented, the Commonwealth's attorney or the court itself was obligated to have Gibson admitted for an examination into his competence to stand trial, whether the defense counsel had requested one or not. *See Pate v. Robinson*, 383 U.S. 375 (1966); *Kibert v. Peyton*, 383 F.2d 566 (4th Cir. 1967). Otherwise the Commonwealth could not even have proceeded to trial.

Moreover, defense counsel had no other choice than to request an examination. His client was in obvious need of psychiatric examination and psychiatric treatment. Defense counsel would have been subject to censure if he had not done what he did. Exercise of his client's right to a competency determination to prove that he was insane at the time of the act cannot be conditioned upon a waiver of

his constitutional privilege against self-incrimination. In a quite similar situation, the Supreme Court held that a defendant's testimony to establish his standing to object to an unconstitutional search could not be used against him during the trial to prove his guilt. *Simmons v. United States*, 390 U.S. 377, 389-93 (1968).

A similar situation involving a state court trial was presented in *Collins v. Auger*, 428 F.Supp. 1079 (S.D. Iowa 1977). The court held that, as a matter of fundamental fairness required by the Fourteenth Amendment, an incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, whether the defendant or the prosecutor requested the examination and whether it was had for the purpose of determining competence to stand trial or sanity. We reach the same result, but on the ground of the privilege against self-incrimination.

III.

The trial judge refused to submit the question of insanity to the jury, and Gibson claims that this amounted to a directed verdict on a factual issue in violation of the Sixth and Fourteenth Amendments. We do not address that question, for Gibson must be either released or retried, and, if retried, the testimony may differ substantially from that taken at the first trial.

IV.

For the reasons stated in Part II, the judgment is reversed and the case remanded to the district court with instructions to issue the writ of habeas corpus, if the Commonwealth does not elect to retry Gibson within a reasonable time.

REVERSED AND REMANDED.